

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/FIRESTONE, INC.,  
TIRES PRODUCTS LIABILITY  
LITIGATION

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BARBARA HAFHEY BOGY, et al.,  
Plaintiffs,  
V.  
BRIDGESTONE/FIRESTONE, INC., et al.,  
Defendants.

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) Master File No. IP 00-9373-C-B/S  
) MDL No. 1373  
) (centralized before Hon. Sarah Evans  
) Barker, Judge)  
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) Individual Case No. IP 01-5411-C-B/S  
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**ORDER ON MOTION FOR REMAND**

Before the Court is plaintiffs' motion for remand of this action to state court. For the reasons set forth below, the motion is DENIED.

**Discussion**

On March 9, 1998, the plaintiffs in this case filed a wrongful death action against Bridgestone/Firestone, Inc. ("Firestone"), Ford Motor Company ("Ford"), and Killens Motors, Inc. ("Killens") in Mississippi state court (the "1998 Case"). In 1999, the plaintiffs entered into two settlement agreements, one with Ford and Killens, and another with Firestone, thus resolving the entire case. The 1998 Case was dismissed on May 18,

1999.

On March 22, 2001, the same plaintiffs filed another complaint in Mississippi state court against these same three defendants (the “2001 Case”). The complaint in the 2001 Case alleges that in settling the 1998 case, the plaintiffs relied on certain discovery responses of Firestone and deposition testimony of its expert. The complaint alleges that portions of the responses and testimony were false, and that had they received truthful information from Firestone and its expert, they never would have settled the 1998 Case for the amount they did. (Complaint §§ 12-13)

Furthermore, the plaintiffs allege in paragraph 14 of their complaint that:

At all material times, all three defendants were acting in concert. Ford and Killens knew that critical portions of Firestone’s discovery responses and deposition testimony were false, yet failed to disclose this information to plaintiffs and acquiesced in said deception. Each defendant ratified the conduct of the other concerning pre-trial discovery.

The defendants removed the 2001 Case to the Southern District of Mississippi on April 19, 2001, maintaining that diversity jurisdiction exists because Killens, who like the plaintiffs is a citizen of Mississippi, has been fraudulently joined. The plaintiffs filed a motion for remand, which was fully briefed by the parties (but not decided by the court) before transfer of the case to this MDL.

The merits of the plaintiffs’ claims against Firestone are not put at issue by the

motion for remand. Rather, this court must determine only whether, under the substantive law of Mississippi, “there is a reasonable possibility that the [plaintiffs] could recover against [Killens].” Schwartz v. State Farm Mutual Auto Ins., 174 F.3d 875, 878 (7<sup>th</sup> Cir. 1999). If so, this case must be remanded for lack of total diversity. If not, the motion for remand will be denied.

The plaintiffs maintain that their allegations in paragraph 14, viewed through the lens of Mississippi law governing fraud claims, demonstrate that Killens could be liable to them. In response, Firestone argues as a threshold matter that the Fifth Circuit has “endorsed a summary judgment like procedure for disposing of fraudulent joinder claims,” and thus a court is not bound by the plaintiff’s allegations in applying the fraudulent joinder test. (Firestone’s Memorandum at 5 (citing Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5<sup>th</sup> Cir. 1990), and Bolivar v. R & H Oil and Gas Co., 789 F.Supp. 1374, 1377 (S.D. Miss. 1991)).

Firestone goes on to offer evidence, most notably the affidavit of Killens, to show, among other things, that in the course of the 1998 Case, Killens (including its owner and employees) (1) never reviewed any of the discovery responses of Firestone or the testimony of its expert, (2) never itself provided any discovery responses or deposition testimony, (3) never made any false statement or concealed material information, (4) is unaware of any false statement made by Firestone or even of *any* representations made by or on behalf of Firestone to the plaintiffs, and (5) was not aware before August of 2000 of

any alleged safety or design issue with respect to the subject Firestone tires.

Although the Seventh Circuit<sup>1</sup> has not expressly adopted a summary judgment standard in connection with fraudulent joinder determinations, a number of the court's decisions make clear that it is appropriate for the district court to look beyond the pleadings when it applies the fraudulent joinder test. See, e.g., Schwartz, 174 F.3d at 879 (holding that liability was not a reasonable possibility "based on [the] law and the *facts*" before the court)(emphasis added); LeBlang Motors, Ltd. v. Subaru of America, 148 F.3d 680, 690-91 (7<sup>th</sup> Cir. 1998)(court determined from discovery responses that statute of limitations barred action against defendant, who was thus fraudulently joined); Gottlieb v. Westin Hotel, 990 F.2d 323, 328 (7<sup>th</sup> Cir. 1993)("[b]ased on the *facts* available, it appears [defendant could not be liable]"). We therefore will consider the evidentiary materials submitted by Firestone in determining whether there is a reasonable possibility that the plaintiffs could recover from Killens in this case.

The plaintiffs have offered no evidence at all in support of their motion for remand – no evidence that Killens acted in concert with Firestone in committing the alleged fraud, no evidence that it ratified it, indeed, no evidence that Killens was aware of any representation (in discovery responses, deposition testimony, or otherwise) made by Firestone to the plaintiffs. The plaintiffs simply label the Killens affidavit "self-serving" and recite that

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<sup>1</sup>The law of the Seventh Circuit governs the removal and remand issues presented in this case. Halkett v. Bridgestone/Firestone, Inc., et al., 128 F.Supp.2d 1198 (S.D. Ind. 2001).

fraud can rarely be proved by direct evidence. (Plaintiffs' Rebuttal at 3) They argue that Firestone has merely raised a question of fact regarding Killens's complicity and that doing so is insufficient to demonstrate fraudulent joinder. (Id. at 4) On the state of this record, it appears that Firestone has done more than raise a question of fact, because it has shifted a burden of production to the plaintiffs that they have not met. But whether a pure summary judgment standard should be employed in fraudulent joinder determinations is a question we need not and do not answer here. Because Firestone has offered specific evidence that Killens was not even aware of any representations made to the plaintiffs on behalf of Firestone, it was incumbent on the plaintiffs to provide some evidence that would allow this court to discern a reasonable possibility that Killens will be held liable to the plaintiffs for fraud.<sup>2</sup> Based on the facts made available to us, we do not. Killens has therefore been fraudulently joined and will be DISMISSED from this action.

The plaintiffs' motion for remand is DENIED.

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<sup>2</sup>Moreover, we are dubious of the plaintiffs' prospects in overturning the settlement agreement with Killens based on the alleged fraudulent inducement of a separate settlement agreement with Firestone. The plaintiffs' briefs do not address this problem. We also do not need to address the additional arguments advanced by Firestone in support of its argument that Killens could not be liable to the plaintiffs.

It is so ORDERED this \_\_\_\_ day of January, 2002.

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SARAH EVANS BARKER, JUDGE  
United States District Court  
Southern District of Indiana

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